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No. 268

In the Supreme Court of the United States

OCTOBER TERM, 1970

EUGENE A. NOLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 423 F. 2d 1031.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1969. A petition for rehearing was denied on April 16, 1970. On May 1, 1970, Mr. Justice White extended the time for filing a petition for a writ of certiorari to June 15, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether the court of appeals properly found that, in the circumstances of this case, the reference to petitioner's wagering tax stamp did not violate his privilege against self-incrimination.

2. Whether the holdings in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, rendered inadmissible evidence seized before those decisions from two premises occupied by petitioner, under search warrants based on affidavits asserting interstate gambling violations and referring to his wagering tax stamp.

3. Whether petitioner had standing to object to use against him of evidence seized under two search warrants from the residence of a co-conspirator.

4. Whether petitioner had a fair hearing on possible taint from electronic surveillance and whether the government's evidence at trial was tainted by illegal electronic surveillance.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the Northern District of Oklahoma of using interstate facilities to conduct a gambling business in violation of 18 U.S.C. 1952 and of conspiracy to commit that offense. He was sentenced to imprisonment for four years and fined $10,000 on each count, the sentences to run consecutively.

The sufficiency of the evidence is not challenged. Petitioner and codefendent Leroy Hines were involved in illegal gambling in 1965 and 1966. The latter operated from premises in Tulsa, Oklahoma, and the petitioner primarily from an apartment in Baton Rouge,

Louisiana. Prior to trial, Hines pleaded nolo contendere.

Two employees of Hines testified that they took bets from him in Tulsa (A. 882–890, 894, 898–909).[1] Wagering tax returns filed by Hines also disclosed that he was in the wagering business from July 1965 through June 1966 (A. 1014–1015). Telephone toll records showed numerous long distance calls between Hines and petitioner, the latter being identified by his brother at the trial as a professional gambler (A. 913–924, 1093–1094, 1025–1026).

Search warrants executed in January 1966 at the Baton Rouge apartment (A. 1061–1065, 1076), and at a New Orleans apartment occupied by petitioner (A. 1041–1053) and in June and July, 1966 at the Tulsa premises (A. 945–952, 1081–1082) resulted in seizure of gambling records and paraphernalia (A. 1151–1163). When Hines was subsequently arrested, papers on his person indicated that he and petitioner had been wagering (A. 1003–1007, 1020–1022).

After a pretrial hearing, the district court ruled that the government's case against petitioner was not tainted by five electronic surveillances. It held that petitioner had not established standing to challenge surveillances by Internal Revenue Agents Perry in 1959 and Yung in 1962. Petitioner sought to prove he was the subject of Perry's surveillance largely by his testimony that he had recognized his voice on the same tapes when they were played at a previous trial at which he was a defendant (A. 735–749). His voice was

[1] References are to the appendix to petitioner's opening brief in the court of appeals.

not identified at that trial and the court refused to believe his present testimony seeking to acknowledge that he was the speaker (A. 776–778). The court refused to infer that Nolan was the subject of the 1962 surveillance because he was generally a prime subject of investigation at that time and the tapes contained conversations of a close associate. It accepted the testimony of Agent Yung that Nolan was not involved (A. 720).

On the basis of testimony from the agent who installed contact microphones (A. 318–325), the court held a third surveillance, by the FBI, to be legal (A. 776). It also held (A. 776), after hearing testimony from agents that the tapes of two IRS surveillances in 1964 were unintelligible (A. 325–344) and listening to part of them (A. 359–362), that the government had met its burden of disproving any taint from those surveillances.

ARGUMENT

1. The government did not, as petitioner seems to imply, rely on petitioner's wagering tax stamp in presenting its case against him. As the court of appeals points out, "[t]he central reference to the stamp came from defendant's brother, Dr. Nolan, who volunteered on both direct and cross-examination that one of his reasons for considering his brother as a professional gambler was his possession of a wagering tax stamp" (Pet. App. 6a; A. 1024–1032). Significantly, petitioner did not object to the reference despite his previous objection to introduction of Hines' stamps on the ground that *Marchetti v. United States*, 390 U.S. 39, and *Grosso v. United States*, 390 U.S. 62, were pending (A. 1014–1015). Instead, defense counsel in his closing

argument stressed the government's failure to introduce the stamp into evidence (A. 1227–1229). The government's brief reply, referring to the then pending Supreme Court cases, was proper (A. 1252). In these circumstances, the court of appeals correctly concluded that petitioner's failure to object to the reference to the stamp was a part of "calculated trial strategy." There is no suggestion in *United States v. Lookretis*, 398 F. 2d 64 (C.A. 7), upon which petitioner relies, that "calculated trial strategy" was responsible for the defendant's failure to object.[2]

2. The affidavits on which warrants authorizing searches of petitioner's apartments were issued contained sufficient information, independent of the reference to the tax stamp, to establish probable cause to believe that interstate gambling violations had been committed.[3] The similar eighteen-page affidavits recited, *inter alia*, that an informant, who had proved reliable in the past, had advised government agents that one Gilbert Beckley and some named employees were furnishing betting line information and accepting layoff bets with other gamblers. They then set forth a detailed analysis of telephone company records regarding numerous calls to various locations, including 386 to Nolan's Baton Rouge apartment and 10 to his New Orleans apartment, which corroborated the information and warranted the conclusion that a gambling operation was being conducted. The records showed use

[2] *Lookretis* was tried without a jury on a stipulation of facts.

[3] Petitioner did not object to the sufficiency of these warrants in the district court although he raised objections to the warrants issued to search the premises of his co-conspirator (A. 954–955).

of telephone credit cards in the name of non-existent firms, and abnormal shifts from heavy use of one card to heavy use of another in calls made to petitioner and nine other named bookmaking operations during a seven-month period (Appendix to Appellant's Reply Brief Below, pp. 1–38). Thus, even if the reference to petitioner's wagering tax stamp was improper, the other facts recited established probable cause for the warrants. A warrant containing both proper and improper grounds is valid if the proper grounds are sufficient to support a finding of probable cause. See *Chin Kay* v. *United States*, 311 F. 2d 317, 321–322 (C.A. 9); *Lucarz* v. *United States*, C.A. 9, No. 24936, decided June 2, 1970.[4]

3. Petitioner has no standing to challenge the legality of the two warrants to search premises occupied by Hines.[5] In *Alderman* v. *United States*, 394 U.S. 165, this Court held that a defendant lacks standing to object to the use of information obtained from illegal surveillance of the conversations of other persons on the premises of a co-defendant. It concluded: "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evi-

[4] In the latter case, the defendant argued that no inference supporting probable cause could arise from his exercise of the constitutional right to the assistance of counsel.

[5] The issue of the legality of these warrants was not raised in appellant's opening brief in the court below but was asserted as error in his reply brief.

dence. Coconspirators and codefendants have been accorded no special standing," 394 U.S. at 171–172. Contrary to petitioner's assertion, standing on the basis of "vicarious criminal liability" is embraced within this ruling.

4. The contention that the eight-day hearing on the motion to suppress the fruits of electronic surveillance was inadequate is answered by the opinion of the court below, upon which we rely (Pet. App. 13a–22a). Nor is the claimed conflict between the decision below and that of the Ninth Circuit concerning the legality of telephone company monitoring significant (Pet. 17–18). The monitoring was not disclosed to the government until several months after search warrants were executed at petitioner's premises in January 1966. This makes it clear that the prosecutor's statements do not, as petitioner asserts, indicate that the government's case derived from leads from telephone monitoring. Concededly, none of the tapes of the monitoring was introduced into evidence (Pet. 17). The monitoring was not related to evidence concerning use of telephone credit cards which was introduced at trial and has not been challenged in this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Brief in Opposition seeks by a tenuous reading of the record [1] to avoid the first and last of the four questions stated in the Petition.

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[1] The Government also construes the record erroneously, we believe, so as to exaggerate greatly the strength of the prosecution's case against petitioner Nolan, in its Statement of facts. To dispel any possible conception that the harmless error rule could apply in this case, we note: (1) Contrary to the Government's suggestion (Br. 3), Hines' two employees, Mahoney (A. 881-93) and Gilmore (A. 894-910), each testified they had never met Nolan or heard his name during their employment by Hines (A. 892, 910). (2) Co[illegible] to the Government's statement (Br. 3), the record did not sh[illegible]ng distance telephone calls or wagering between

This Reply is accordingly addressed to the Government's record-based arguments on questions 1 and 4. With respect to questions No. 2 and No. 3,[2] the Government's argument contains no record references and the contentions which it makes are dealt with in the Petition.

Question 1(a): Nolan did not "imply" (Gov. Br. 4) that the Government relied on Nolan's wagering tax stamp in presenting its case against him. The Court of Appeals *found* that "The Government . . . sought to bring the stamp before the jury by way of references to it in testimony and arguments" (Pet. App. 9a). The Court of Appeals also found that "there was a real danger here that these references might become 'a significant "link in a chain" of evidence' tending to establish Nolan's guilt." (Pet. App. 7a.)

The issue is not whether Nolan's compelled purchase of the stamp was used to incriminate him; plainly it was. The issue is whether Nolan waived his privilege against self-incrimination by failure to interpose a *Marchetti-Grosso* objection prior to this Court's decision in those cases.

Hines and petitioner Nolan. What the record did show was (a) calls between the pay phone on Hines' premises in Tulsa and a number listed to an apartment leased or owned by petitioner Nolan in Baton Rouge, and (b) that petitioner Nolan was living in New Orleans and the Baton Rouge apartment was being used by his brother Jojo Nolan, a gambler suspected by the FBI of operating a good portion of his gambling business from the Baton Rouge apartment. (See Pet. 5-6, nn. 4-5; A. 1041-42, 1076-79; A. 911-25, 929-44, 1118, 1125 1180-81, 1188-89, 1217-24.)

[2] We refer to the numbering in the Petition. The Government has followed a different numbering in its Opposition, replying to Question No. 2 in its paragraph No. 3, and to Question No. 3 only in the first sentence of its paragraph No. 4.

The Government apparently seeks to absolve itself of responsibility for the use of the stamp because defendant's brother, Dr. Nolan, "volunteered" his reference to it at trial (Gov. Br. 4). The Government does not mention that it was the prosecution which called Dr. Nolan as a trial witness (A. 1022); that after indictment—and after the grants of certiorari in *Costello* v. *United States*, 383 U.S. 942 (1966) and *Grosso* v. *United States*, 385 U.S. 10 (1966)—the Government obtained pretrial discovery of Dr. Nolan's prospective trial testimony by calling him before the grand jury and questioning him about petitioner's gambling stamp (A. 2221-29); and that Dr. Nolan's reference to petitioner's gambling stamp before the petit jury was elicited on direct examination by the Government's use of the post-indictment grand jury testimony to refresh Dr. Nolan's recollection (A. 1023-25).[3]

The grand jury obviously had also heard pre-indictment references to petitioner's gambling stamp, for one of the overt acts alleged in the indictment was that petitioner "did obtain a Federal Wagering Tax Stamp." (A. 3.) The Government chose to include this allegation even though this Court had already granted certiorari in *Costello* v. *United States*, *supra*. Thus the Government did not anticipate from such grant of certiorari that proof of the wagering stamp would become inadmissible. Yet it would assert a waiver in petitioner's failure to interpose an objection

[3] An objection to Dr. Nolan's trial testimony as being the fruit of the post-indictment grand jury interrogation was overruled (A. 1023). Immediately following the overruling of this objection, the prosecution proceeded to utilize the grand jury testimony (A. 1023-25) and in response to a question as to what he said before the grand jury, Dr. Nolan replied: "I said he [petitioner] held a gambling stamp." (A. 1025.) This was how the petit jury originally learned of petitioner's gambling stamp.

urging that the trial Court anticipate a *Marchetti-Grosso* ruling excluding Dr. Nolan's testimony about petitioner's stamp. Such an objection would, moreover, have been futile to exclude Dr. Nolan's testimony, even if defense counsel could have anticipated what testimony Dr. Nolan would "volunteer" when the Government refreshed his recollection, for the trial court had just overruled an objection on similar grounds to the introduction of Hines' gambling stamp. (A. 1014-15.)[4]

The record simply does not show that conscious and intentional abandonment of a known constitutional right by petitioner, which would be prerequisite to finding a waiver even in circumstances where no problem of retroactivity was involved.[5] See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Fay* v. *Noia*, 372 U.S. 391, 439 (1963).

The situation here, where petitioner was suddenly confronted at trial by Government-anticipated repetition of grand jury testimony concerning his gambling stamp, is far less conducive to a finding of conscious and deliberate waiver than the situation in *United States* v. *Lookretis*, 398 F.2d 64 (7 Cir. 1968). Petitioner is puzzled as to how the Government deems it helpful to its position that *United States* v. *Lookretis* was tried on a stipulation of facts and with-

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[4] While the question of standing was discussed, the trial court did not give lack of standing as the basis for this ruling.

[5] There were no factual findings on the waiver question, since that question was not in issue in the District Court. Speculation that the failure to object on *Marchetti-Grosso* grounds "*can be plausibly* attributed to" counsel's trial tactics (Gov. Br. 5, Pet. App. 9a, emphasis supplied), can hardly substitute for findings on petitioner's state of mind at the time of the alleged waiver. Of course, once Dr. Nolan's damaging testimony about the gambling stamp was before the jury, petitioner's counsel were obliged to cast it in the best light possible in summation.

out a jury (Gov. Br. 5, n.2). The defendant's stipulation that his wagering stamp be admitted in evidence is certainly a more deliberate action than a failure to object before the jury to damaging evidence suddenly elicited by the Government in the heat of trial. And, as a judge is normally presumed to exclude inadmissible evidence in reaching a verdict, the non-jury aspect of *Lookretis* strengthens petitioner's contentions. For the *Lookretis* court held that even that presumption could not save the conviction: " . . . [T]he trial judge would have had no reason, in this pre-*Marchetti* trial, to regard the recitals . . . concerning the application for and issuance of the federal wagering tax stamp as being inadmissible against the defendant on a Fifth Amendment challenge, which although not made was, nevertheless, in the posture of this case, not waived." 398 F.2d at 66. Petitioner should not be held to greater prescience than the *Lookretis* trial judge.

Question 1(b): The Government seeks to avoid the issue of whether *Marchetti* and *Grosso* may retroactively invalidate search warrants by contending that the affidavits would have shown probable cause without the factual allegations as to the wagering stamp. (Gov. Br. 5-6. The Government does not make this contention with respect to the searches of Hines' premises, see Pet. 5-6, but disputes petitioner's standing to challenge those searches.)

But in order to establish probable cause to search petitioner's apartment at 1051 Rittiner Drive, Baton Rouge, for bookmaking records and wagering paraphernalia, the crucial showing of the affiant was that petitioner had an occupational tax stamp to engage in the business of accepting wagers at that precise address. This allegation supplied the essential corroboration for the information ascribed to "infor-

mants", that petitioner operated a bookmaking enterprise at that address and kept most of his wagering records there. (Appendix to Reply Brief in Court of Appeals, 15-16.) Without this corroboration, the affidavit would have been insufficient under the test of *Spinelli* v. *United States*, 393 U.S. 410 (1969). No other facts were set forth in the affidavit to support the conclusory allegations that the unidentified "informants" were reliable. And absent the allegations as to the wagering stamp, the alleged placement of numerous long distance calls to Petitioner's number at 1051 Rittiner Drive would be "innocent-seeming" activity within the meaning of *Spinelli*.

That Nolan did not challenge the affidavit in the trial court (Gov. Br. 5, n. 3) misses the point. At the time of trial, the Government legitimately could use his self-incriminatory purchase of the wagering stamp for 1051 Rittiner Drive. Nolan had no ground to object to the affidavit at trial. But, between trial and appeal, the critical factual allegation in the affidavit was rendered objectionable.

The issue tendered by the Petition remains: whether Nolan may raise the objection now.

Question 4. The Government does not appear to challenge petitioner's contention that the Ninth Circuit's final judgment of illegality in *United States* v. *Nolan*, No. 24032 (9 Cir. 1970), collaterally estops the Government from defending the legality of the Nolan-Bubis monitoring here. (See Gov. Br. 7.)

The Government seeks to avoid the consequences of this determination of illegality by boldly asserting, without benefit of any record reference:

> "The monitoring was not related to evidence concerning use of telephone credit cards which was

introduced at trial and has not been challenged in this Court."[6] (Gov. Br. 7.)

The Government ignores not only the record but the opinion of the Court of Appeals. That opinion noted that the trial court, having found the monitoring lawful, never reached the issue of taint with respect to these tapes (Pet. App. 14a, 17a). And the Court of Appeals affirmed the ruling on legality, likewise not reaching the issue of taint (Pet. App. 17a-19a).

The fact that the tapes were concededly not themselves introduced into evidence (Gov. Br. 7) does not, of course, establish that no leads were obtained from them. Nor does the fact (Gov. Br. 7) that certain search warrants were obtained "several months" before the tapes' disclosure to the government. The indictment was not returned until more than eight months after the search warrants were executed (A. 6), so that the disclosure of the tapes long antedates the return of the indictment; and the taped conversations had occurred during the period covered by the indictment. (See Pet. App. 29a and the facts recited in *Bubis* v. *United States*, 384 F.2d 643 (9th Cir. 1967)).[7]

The prosecutor's statements cited in the Petition (Pet. 18a) are at least a prima facie indication that the

[6] We simply do not understand the concluding clause of this sentence. The monitoring was of course challenged in Question 4 of the Petition.

[7] The opinion below noted that the tapes involved here apparently resulted from the same surveillance described in *Bubis* v. *United States*, 384 F.2d 643 (9th Cir. 1967). (Pet. App. 19a.) Both the opinion in *Bubis* and the stipulated facts in the record in *United States* v. *Nolan*, No. 24032 (9 Cir. 1970), show that the electronic surveillance extended from December 1965 to March of 1966.